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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GONZALO PADILLA, Defendant and Appellant.	B176351 (Los Angeles County Super. Ct. No. BA 251397)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Darden & Associates, Inc., Christopher A. Darden for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Gonzalo Padilla, was convicted after a jury trial of one count of carjacking (Pen. Code § 215, subd. (a))[1], one count of robbery (§ 211), and one count of assault with a firearm (§ 245, subd. (a)(2)). He was also found to have used a firearm during the commission of the three offenses (§ 12022.53, subd.(b); § 12022.5, subds. (a) and (d)). He was sentenced to fifteen years in prison. He appeals from the judgment, alleging the trial court erred in the manner it read instructions to the jury, the evidence was insufficient to sustain his convictions, and counsel provided ineffective assistance. We affirm.

FACTS

The Prosecution's Case

On August 2, 2003, at 5:45 p.m., Jose Perez was preparing to enter his Honda, which was parked in a public lot. As he opened the door, defendant pushed him from behind and told him to get into the car. The two men struggled briefly outside the car. Defendant placed his hand over Perez's mouth and Perez bit defendant in the area of his thumb. Defendant pulled out a handgun and demanded Perez's wallet and keys. After receiving the wallet and keys, defendant entered Perez's car and began to drive it away. Perez saw a patrol car in a nearby alley. He began yelling to the sheriff's deputies that someone was stealing his car. The deputies approached the area of the parking lot, noticed a Honda driving through the lot, and moved to block its path. Defendant, the sole occupant of the Honda, got out of the car and began jogging away through the parking lot. After several orders to stop, defendant finally complied. The deputies were told by a witness that defendant had tossed a handgun over a fence toward some nearby apartment buildings. The loaded gun was recovered. Perez's wallet was found in his car.

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1 All statutory references are to the Penal Code.

At trial, Perez identified defendant as the man who robbed him. Cherie Rodriguez, a bystander in the parking lot, identified defendant as the person who exited Perez's Honda and threw the gun over the fence. Deputy James Peterson, one of the two deputies in the summoned patrol car, identified defendant as the driver of the Honda he and his partner prevented from exiting the parking lot.

The Defense Case

Defendant testified his friend Huero dropped him off at the parking lot. As he walked through the lot, he was approached by two males. One of the men tried to take defendant's necklace. Defendant said this individual looked like Perez, the person "that's supposedly the victim in this case." Two other males came up behind defendant and one of them took his wallet, which contained $800.00. Defendant and the men (defendant did not specify how many) engaged in a short struggle. One of defendant's attackers produced a gun and defendant ran. Defendant also lost a cell phone which had been on a clip attached to his belt. He claimed he first saw the Honda near the alley. (The other witnesses established that sighting would have been after the Honda was moved from the parking space.) When the deputies arrived, he tried to tell them he was a robbery victim, but they handcuffed him. He saw the deputies retrieve the gun near the apartments. Defendant again attempted to explain he had been robbed, but he was cursed and told to shut up.

On August 4, he spoke to the investigating officer, Detective Ignacio Lugo. Defendant said he had spent the day of the robbery with various friends, including Huero. He told the detective he would not divulge the names of his other friends or provide a means to contact them because he "did not want to get them involved." Defendant initially testified he did not tell the detective about Huero dropping him off in the parking lot because the detective did not ask. Later, on re-direct examination, he testified he told Lugo that Huero dropped him off in the lot because it was full.

Prosecution's Rebuttal Evidence

Detective Lugo testified he interviewed defendant on August 4. Defendant told him he worked the morning of the robbery and provided the name of his employer. After his shift, he gave a co-worker named Huero a ride home. At Huero's apartment, defendant drank beer with Huero and Huero's cousin. Defendant decided to walk to Whittier Boulevard to buy some clothes. As he walked through the parking lot, Perez, the owner of the red Honda, approached him and demanded defendant's jewelry. Perez and he struggled outside the Honda when two other men arrived. One of the robbers pulled out a gun and defendant slapped it away. One of the perpetrators was able to flee with defendant's wallet. One of the assailants got into the Honda, drove a short distance, stopped and exited the car, threw the gun, and ran down the alley.[2]

When he told defendant he wanted to contact defendant's employer and the other witnesses to corroborate his story, defendant refused to give him any information. When the detective tried to explain how important it was to try to clear his name, defendant admitted he had lied. He did not go to work that day. He made up the story about where he met Huero and he lied about the other witnesses with whom he claimed to have spent time in the hours preceding the robbery.[3]

DISCUSSION

A. Instructional Error

After the conclusion of the evidence, the trial court read most of the instructions to the jury. The attorneys gave their closing arguments. The court then read the concluding instructions, starting with the instruction informing the jury how it was to view defendant's out of court statements (CALJIC No. 2.71 (Jan. 2005 ed.).) This, defendant asserts, was error.

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[2] During cross-examination, defendant denied he told the detective that he slapped the gun away and saw one of the robbers throw the gun.

[3] On cross-examination, defendant denied this conversation took place.

It is important to note, defendant does not claim the instruction should not have been given. Indeed, the court properly included this instruction, as there was evidence of defendant's alleged out of court statements provided to the jury. Defendant merely complains about the time the court chose to read the instruction. He argues the jury was informed it should view the defendant's out of court statements with caution. He claims by reading the instruction immediately after the prosecutor's final argument, wherein he called defendant a liar, the trial court prejudicially highlighted the point defendant could not be believed. This contention is completely meritless.

First, defendant provides no authority for the proposition that the sequence in which the instructions are read constitutes reversible error. The manner in which the instructions are read is within the discretion of the trial court. (§§ 1093, 1094; *People v. Chung* (1997) 57 Cal.App.4th 755, 759 [trial court read some instructions after opening statements and the rest after closing argument].) In order to establish an abuse of discretion, a party must provide evidence the jurors were confused by the instructions and the court failed to rectify the problem. Defendant has failed to do so. There was no error. (*Id.* at p. 760.)

Second, he ignores the fact the cautionary language in the instruction is included for an accused's benefit. The court has a sua sponte duty to inform the jury an oral admission of a defendant not made in court should be viewed with caution. (*People v. Beagle* (1972) 6 Cal. 3d 441, 455, overruled on other grounds in *People v. Castro* (1985) 38 Cal.3d 301.) The instruction does not imply, as defendant contends, the jury should view a defendant's *testimony* with caution.

Third, the instruction was followed by CALJIC No. 2.72 (Jan. 2005 ed.). The jury was told, "[n]o person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any admission made by him outside of this trial." In short, any possible error in this regard could not have prejudiced defendant. (*People v. Watso*n (1956) 46 Cal.2d 818, 836.)

B. Insufficiency of the Evidence

Pointing to perceived inconsistencies in the prosecution's case, defendant argues the trial court erred when it denied his motion for a new trial on the ground of insufficiency of the evidence. He asserts we must reverse his conviction for the same reason. Notwithstanding defendant's claims, a jury's verdict will not be disturbed if substantial evidence supports it. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) This court must view the evidence in the light most favorable to the judgment and presume true every fact in support of the judgment which the trier could have reasonably deduced from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Defendant repeats the same arguments he presented to the jury. He points to various "omissions" and "contradictions" in the prosecution's case. Defendant glosses over the pertinent evidence which supports the verdict. First, he was connected to the robbery by three independent witnesses who had different vantage points. Second, in his testimony defendant admitted that he struggled with Perez in the parking lot. In order to explain his presence at the crime scene, defendant attempted to persuade the jury that he, not Perez, was the robbery victim. The jury's rejection of his claim leads to the inescapable conclusion defendant was the perpetrator. Third, defendant's credibility was damaged by Detective Lugo's testimony. Defendant told Lugo about going to work, seeing friends on the morning and afternoon of the robbery, and arriving at the parking lot. When asked to provide the necessary information so that the detective could contact the witnesses, defendant admitted he had lied and then changed his story.

The trial court properly denied defendant's new trial motion and the jury's verdict is clearly supported by the evidence.

C. Alleged incompetence of counsel

Defendant asserts his attorney's failure to call Huero at trial constituted ineffective assistance of counsel. He argues Huero was present in the courthouse to offer testimony to support defendant's version of the events, including the claim

defendant was the robbery victim. Defendant raised the same issue in his motion for new trial. His motion did not include a declaration from trial counsel explaining why counsel chose not to call Huero to testify. "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

It is defendant's burden to establish counsel's representation was inadequate. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) However, defendant has never provided a declaration from Huero establishing he was willing to testify or that he could say defendant was the victim of the robbery. Defendant points to Huero's statement to the public defender investigator. According to the statement, Huero dropped defendant off at the parking lot so that defendant could purchase some clothes. Huero saw defendant fighting with two individuals prior to the police placing defendant under arrest. He could provide no further details.

What is compelling is what Huero could not provide. In his statement, he did not say he saw defendant being robbed. He did not claim to see the Honda, the subject of the carjacking. He could not offer any evidence to refute the prosecution witnesses' testimony that defendant was driving the victim's car. He did not explain why he did not stay to offer a statement to the police. Defendant must affirmatively prove prejudice resulted from counsel's performance. (*Strickland v. Washington, supra,* 466 U.S. at p. 693.) He has failed to do so.

DISPOSITON

The judgment is affirmed.

NOT TO BE PUBLISHED.

SUZUKAWA, J.*

We concur:

SPENCER, P. J.

VOGEL, J.

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* (Judge of the L. A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)